United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1169

B
Pgs
6

United States Court of Appeals

FOR THE SECOND CIRCUIT

ATAKA & CO., LTD.,
Plaintiff-Appellant and Cross Appellee,

against

DERRICK BARGE HOWLETT NO. 18, its engines, boilers, etc., M.P. HOWLETT INC., and EDWARD WITHAM,
Defendants and Third-party Plaintiffs-Appellees and Cross-Appellants,

against

ISTHMIAN LINES, INC., STATES MARINE-ISTHMIAN AGENCY, INC., MAHER STEVEDORING COMPANY, INC., and INTERNATIONAL CARGO GEAR BUREAU, INC.,
Third-party Defendants,

and

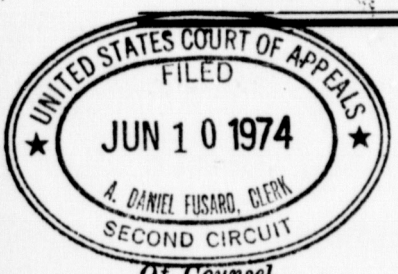
THE HOME INSURANCE COMPANY,
Third-party Defendant and Fourth-party Plaintiff,

against

FIREMAN'S FUND INSURANCE COMPANY,
Fourth-party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT



HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN,
Attorneys for Plaintiff-Appellant and Cross-Appellee
96 Fulton Street
New York, New York 10038
Tel. (212) 233-6171

Of Counsel
MARTIN B. MULROY

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases:

PAGE

PAGE

Other Authorities:

Statutes:

BRIEF FOR PLAINTIFF-APPELLANT

Statement

This is an action by Ataka & Co., Ltd. (hereinafter Ataka) as cargo owner against Derrick Barge HOWLETT No. 18 *in rem* and its owner *in personam* on the basis of negligence in that they caused Ataka's cargo to be lost overboard. These defendants impleaded the steamship company that leased the use of the barge and its operators, the stevedores that placed Ataka's cargo on the barge for loading to the steamship company's ocean vessel, and the testing company who was conducting a test of the lifting capacity of the derrick barge when it listed and lost Ataka's cargo overboard.

Ataka & Co., Ltd. moved in the District Court for summary judgment against the owner operator of the barge as well as the Derrick Barge *in rem* on the issue of liability, and to strike defendants' affirmative defense of being entitled to the $500 per package limitation afforded carriers under the United States Carriage of Goods by Sea Act (COGSA), 46 U.S.C.A. § 1300 *et seq.* The Court, although not in the sequence stated, granted Ataka's motion on liability, but denied its motion to strike the affirmative defense as to damages, and then proceeded to determine that liability must be limited. It is this latter determination by the District Court embodied in a final judgment (A 53)* that brings Ataka before this Court.

The determination by the District Court was made contrary to legal authority and without any basis of precedent, and it is in error because it chartered a course without reference to applicable maritime law principles historically developed and refined by this Court.

---

* References to all matter included in the appellants' Appendix will be designated "A" followed by the page number.

Facts

The cargo owner, Ataka, through its freight forwarder delivered a case of machinery to a steamship company pier for shipment to Japan. The steamship company had under lease or charter (A 23) Derrick Barge HOWLETT No. 18 to load cargo to its vessels, in this case, the "SS STEEL ADMIRAL". Ataka's cargo was placed on the derrick barge for that purpose on Friday, April 3, 1970 at Erie Basin Terminal. But instead of loading the cargo to the vessel or taking it off the barge as directed by the dock boss of the steamship company the Derrick Barge was ordered by its owner to move away from the vessel and terminal to go and have its crane tested for lifting capacity as required for Certification by the U.S. Department of Labor, and the cargo was left on board the derrick barge. Testimony by the ocean carrier's dock boss is defendant refused to take Ataka's cargo off the barge saying it would improve "stability" when at Todd Shipyards testing the lifting capacity of their crane (A 9). Certification by the U.S. Department of Labor was a function specifically excluded from the responsibility of the steamship company under the terms of the lease agreement between the steamship company and the appellees (A 23).

While lifting a 66 ton test tank the barge started to roll and the appellant's cargo went overboard along with two rolls of cable not involved in this action (A 11, 29).

The only defense raised on behalf of the barge and its owner is the $500 limitation of liability provision of 46 U.S.C. Section 1304.

The District Court's Opinion (A 44)

1. The District Court for the purpose of this case held the voyage began when the cargo was loaded on the barge. If the barge had sunk during the weekend with appellant's

cargo on its deck the court stated the limitation would apply and extended his conclusion of law to grant the limitation under the facts of this case. The court viewed the digression of the barge as a permissable "deviation" under the liberties clause, paragraph 4 of the bill of lading:

"Having determined that the voyage began for plaintiffs' case of machinery when it was placed on the barge, then it follows from the broad definition of the scope of the voyage contained in the bill of lading that the goods were still on the voyage while the barge was having its crane tested" (A 49).

This position was not urged, suggested or briefed by any of the parties.

2. The District Court held there is no basis in distinguishing a vessel *in rem* from its owner in construing contractual provisions limiting liability and apparently held an *in rem* admiralty proceeding is the same as a civil action quasi *in rem* (A 48).

3. The District Court restricted its references to "Deviation" to route not considering what was done to Ataka's cargo in carrying it "on deck" and misusing it for ballast during testing of appellee's crane (A 50).

4. The District Court ignored the fact that appellee-contractor and its derrick barge were not engaged in the "performance of the work and services of the carrier" when they transported the appellant's cargo to Todds Shipyard to have their crane tested using the appellant's cargo to give additional stability to the barge during the testing away from the ocean carrier's terminal.

5. The Court refused *sub silencio*, to apply the legal principle urged that a contract provision that strips an aggrieved party of his common law remedy must be

strictly construed against the party claiming the benefit of such a contract saying to do so under these facts would be an absurdity (A 48).

POINT I

The lower Court is in error to hold the voyage begins when cargo is placed on a barge and this holding is an essential to its decision that the package limitation applies to appellees.

The entire basis for the decision below limiting liability is that the voyage commenced "at least" when appellant's cargo was loaded to the barge (49). From this basis the Court used the Scope of the Voyage clause of the bill of lading to justify Ataka's cargo being used as ballast for appellee barge during testing of its crane and thus deprive Ataka of compensatory damages, a result that could not otherwise be reached by law or logic.

The basis for the decision was not presented as an argument to the court by appellees who are as surprised as appellant by its application.

The General Maritime Law has long held contrary to the District Court decision in this case as to when a voyage begins.

In 1907, the Second Circuit in *Ralli et al* v. *New York & T.S.S. Co.*, 154 Fed. 286, involving the sinking of a lighter on which cotton was laden held that the voyage does not commence until the cargo is all on board the vessel on which the merchandise is to be transported. By lengthy footnote to the District Court opinion the Court affirms "the act [Harter] is to be construed as applying only to vessels carrying merchandise on voyages from one port to another for which formal Bills of Lading are usually issued * * *".

The concept of when a voyage commences is of monumental significance as a legal doctrine. The Fifth Circuit Court of Appeals in *Mississippi Shipping Co. Inc.* v. *Zander and Company Inc. et al.*, 270 F. 2d 345 (1959), held that when a voyage commenced is a question of fact and set forth criteria by which the determination should be made in the following terms:

> "* * * In a very real sense the voyage had begun. The ship had no further purpose at the dock. She was made ready for sea. She was being turned around for the purpose of leaving. The lines to the dock were fast not to keep her there or to continue her stay at the wharf. They were there solely as an essential step in her navigational maneuvering. They were no less vital than the hawser to the straining tug off the starboard quarter. The ship's engines were actively maneuvering to accomplish the swing and officers and men were stationed for simultaneous undocking and departure. The ship was literally and figuratively in the sole command of the master on the bridge. (p. 349)
>
> * * *
>
> What we decide is consistent with the ancient observation of Judge Story that '* * * the voyage commences, when the ship breaks ground for the purpose of departure * * *' ".

On the basis of the foregoing authorities it is clearly erroneous for the District Court to have held that the voyage commenced when the appellant's cargo was loaded to the barge.

In *The Willowpool*, 12 F. Supp. 96, 1935 A.M.C. 1292, the Southern District of New York held that a voyage did not commence until the vessel left her moorings at the buoys.

In *Aspen Pictures, Inc.* v. *Oceanic SS Co.*, State of California, District Court of Appeal, 1957 A.M.C. 2388, 2397,

not officially reported, the Court found

> "With reference to the contention that the Harter Act is the applicable statute, that act is superceded by COGSA in domestic commerce at the option of the carrier when the Bill of Lading contains an express statement that it shall be subject to the Carriage of Goods by Sea Act (46 U.S. Code, sec. 1312). In the instant case, the dock receipts specifically provide that the custody and carriage of the goods shall be governed by the contractual terms and conditions of Oceanic's regular bill of lading, and the bills of lading expressly incorporate the provisions of COGSA. Moreover, the *Sierra* did not leave the port of Los Angeles, and the Harter Act does not apply in any event until the vessel 'breaks ground' to start her voyage. (Newport, 1925 A.M.C. 1193, 7 F. 2d) 452; KNAUTH, *Ocean Bills of Lading,* Fourth Ed. (1953), p. 166.) Plaintiff's goods were discharged and returned to it before the voyage commenced." (p. 2397).

Probably one of the most appropriate illustrations of the error of the District Court in applying the "voyage" concept of the Bill of Lading to the barge in order to stretch the steamship company's package limitation back to the barge and its owner is found in the language of *Gardner* v. *Tug L. N. Danzler,* 177 F. Supp. 736, 1959 A.M.C. 2432, at p. 2440:

> "The term 'voyage' has no fixed meaning but is dependent upon the particular situation. *La Bourgogne,* 210 U.S. 95, 135. The interpretation of the word 'voyage' must be determined by reference to its context in the statute to be applied and by determining the Congressional intent in enacting the statute sought to be enforced. *Buttimer* v. *Detroit Sulphite Trans. Co.* (E.D. Mich.), 1941 A.M.C. 1780, 39 F. Supp. 222. As was said in *John Martin,* 13 Fed. Cas. 694, 697:

> " 'The term "voyage" as applied to vessels engaged in foreign and interstate commerce, within the meaning of the maritime law, is not applicable to a tug making short trips, not from port to port, but from one body of water to another, merely furnishing motive power to other vessels. It would be a misnomer to apply the term voyage in the sense of the maritime law to such trips.' "

In *Cuyamel Fruit Company* v. *S.S. Pelotas,* 1927 A.M.C. 1347, not officially reported, the Eastern District of Louisiana stated:

> "Moreover, in contemplation of law, a voyage of a vessel has been consistently recognized and defined as the sailing or passage or transit of a ship from her port of origin to her port of destination." (p. 1351). See also *The Marmor,* 56 F. Supp 435, 1944 A.M.C., 1380; *The Massassoit,* 1928 A.M.C. 1458.

A consideration of these authorities does clearly indicate that the "basis" for the decision below, that the voyage commenced, must fail. Since it is from this the Court reasoned the package limitation defense properly belongs to the defendant derrick barge and its owner while on its "frolic and detour" with the appellant's cargo that decision must likewise fail. The lower court rejected defendants' argument and could find only this basis on which to justify its holding. Therefore, it is respectfully submitted, there is no reason under the facts of this case for the derrick barge or its owner having the benefit of the contract (Bill of Lading) to which they were neither a party nor an intended beneficiary *at the time of plaintiff's loss.*

POINT II

It is error not to apply the principle that stowage of cargo on the deck of a barge constitutes an unlawful deviation rendering the package limitation void where the barge acts as a carrier.

If the District Court was correct in holding that the voyage began when the plaintiff's case of machinery was loaded on the derrick barge, and if, following this hypothesis, the District Court was similarly correct in considering the scope of the voyage to justify a deviation in the route that cargo was to follow whereby the vagaries of transportation justified the plaintiff's cargo to be transported away from the ocean carrier terminal to Todd's Shipyard to play a part in the test of the barge's lifting capacity prior to being placed on the ocean going vessel a short distance away from the start of this odyssey-like voyage *there is another deviation which the District Court did not consider.*

The Courts have long recognized that the stowage of cargo on deck by its nature is an added risk and the carriage of cargo on deck is inherently more dangerous than the carriage of goods within the confines of a ship's hold. Cargo stowed below deck will not be lost unless the ship itself is lost. *The Kirkhill,* 99 F. 575, 578, 579 (4 Cir. 1900). In *Propeller Niagara* v. *Cordes,* 62 U.S. 649, 21 H. 7, 16 L. Ed. 41 (1858) the Supreme Court stated:

> "* * * A clean bill of lading, in general, imports, unless the contrary appear on its face, that the goods are to be safely and properly secured under deck." (p. 658).

The carriage of cargo on deck pursuant to a clean bill of lading constitutes a deviation resulting in the loss to the carrier of the exculpatory provisions of the bill of

lading clauses and substitute an insurer's liability without the benefit of any package limitation. *Gilmore and Black,* the *Law of Admiralty,* Sections 3-42, P. 161; *Encyclopaedia Britannica* v. *SS Hong Kong Producer, et al.,* 422 F. 2d 7 (2 Cir. 1969), cert. den. 397 U.S. 964, 90 S. Ct. 998 (1970); *Searoad Shipping Company* v. *E.I. Dupont P. de Nemours and Company, Incorporated,* 361 F. 2nd 833 (5 Cir. 1966); *Jones* v. *Flying Clipper,* 116 F. Supp. 386 (S.D.N.Y. 1953).

The Court will note that even where underdeck stowage violates Coast Guard regulations a carrier does not have a right to carry cargo on deck. *Searoad Shipping Company* v. *E.I. Dupont de Nemours & Company, Incorporated, supra.*

Clause 7 of the bill of lading in this case (A 36) is quite similar to the clause construed by this Court in *Encyclopaedia Britannica* v. *SS Hong Kong Producer, supra,* in which this Court held that the on deck stowage of a container in the case of a general cargo vessel was an unlawful deviation.

Accordingly, were the District Court correct in its reasoning that the voyage commenced when the cargo was loaded on the deck of the barge, there would be no limitation of liability for a steamship company to extend to the appellee barge owner or barge.

POINT III

The derrick barge *in rem* is not a third party beneficiary of Clause 3 of the Bill of Lading because it is not so identified.

Clause 2 of the bill of lading makes COGSA applicable to the period before ships tackle by the following terms (A 36):

> "Clause Paramount. This bill of lading shall have effect subject to the provisions of the Carriage of

> Goods by Sea Act of the United States, 1936, or similar Act in force in the locality where issued. *All the provisions of such Act shall apply* throughout the entire time that Goods are in Carrier's custody including periods of Carrier's custody *before loading* on and after discharge from Vessel whether Carrier be acting as such or as bailee during such periods. This bill of lading is also subject to and incorporates the provisions of Sections 4281-4286, 4289 of the U.S. Revised Statutes and amendments thereto." Italics added.

But the definitions section of the bill of lading conflicts with the definitions of COGSA.

The bill of lading defines "ship" to include "any substituted vessel and any craft, lighter or other means of conveyance owned, chartered or operated by Carrier in the performance of this contract . . ." but does not include "ship" as so defined in the definition of "carrier" but "the vessel named herein . . . and any substituted carrier . . ."

COGSA states "The term 'ship' means any vessel used for the carriage of goods by sea" and the term "carrier" only includes "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C.A. § 1301

This, of course, excludes the derrick barge which is not sea going and could not have started on the voyage.

If the voyage had begun as the District Court said then COGSA would apply *ex proprio vigore* and the barge would be excluded as a "ship" since it was not self propelled being a "dumb" barge and it could not be a "carrier" within the meaning of the statute or the bill of lading.

This conflict in definition precludes the barge *in rem* from asserting any rights as a beneficiary of clause 3 of the bill of lading or 46 U.S.C. § 1304 (5) by virtue of the ambiguity. *Mamiye Bros* v. *Barber Steamship Lines Inc.*, 241 F. Supp. 99 (1965); *Buchanan* v. *Swift*, 130 F. 2d 483 (7 Cir. 1942).

In order to drag a barge *in rem* into the limitation of liability cloak of clause 3 it is necessary that the COGSA definitions above be scrapped and the Court use the bill of lading definition of "ship" and then since resort to the language of clause 15 of the bill of lading is of no use, expressing the limitation without use of the word "ship," it is necessary to go back to the COGSA limitation:

Clause 15	*46 U.S.C.A. 1304(5)*
"If the actual value of any package, piece or customary freight unit of cargo when not shipped as piece or package exceeds $500 . . . the actual value shall be declared by Merchants in writing before shipment and inserted in this Bill of Lading and extra freight paid thereon if required. If that is not done, the value of such goods shall be deemed to be $500 . . . per package, piece or customary freight unit, if the value is $500 or less *the carrier's liability,* if any, shall be limited to the invoice value of the goods as hereinafter defined, on which basis the rate of freight is adjusted but in no event shall carrier's liability exceed the market value at port of discharge. Any partial loss or damage shall be computed pro-rata on the basis of the applicable value * * *"	"Neither the carrier *nor the ship* shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier * * *"

With respect to such verbal gymnastics the U.S. Supreme Court in *Carbon Black Export, Inc.* v. *SS Mon-*

rosa, 254 F. 2d 297 (5th Cir. 1958), 79 S. Ct. 710, 359 U.S. 180, said:

> ". . . In accordance with the familiar rule in such circumstances, we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have. The Caledonia, 157 U.S. 124, 137, 15 S. Ct. 537, 542, 39 L. E. 644; The Majestic, 166 U.S. 375, 286, 17 S. Ct. 597, 602, 41 L. Ed. 1039; Compania de Navegacion La Flecha v. Brauer, 168 U.S. 104, 118, 18 S. Ct. 12, 15, 42 L. Ed. 398. Considerations involved in construing exemptions from carriers' liability provided by Acts of Congress are, we think, quite different".

To this, the District Court erroneously proclaimed:

> "* * * The difference between a ship, a vessel or a barge on the one hand and its owner on the other has long been recognized in admiralty (see e.g. 46 U.S.C. Section 183) but there is no basis in fact or in law to adhere to that distinction in the circumstances presented here" (A 48).

The District Court decision is clearly erroneous in this regard as well because there is a substantial basis both in fact and in law to distinguish the immunities one has *in personam* from the immunities exercised *in rem.*

It is simplistic to suggest that the cargo owner could not proceed against a stevedore's mechanical devices in rem to avoid the immunities that the stevedore would have in an *in personam* action. The reason this is simplistic is because the stevedore's devices can only be sued on the theory of *quasi in rem* liability on the part of the stevedore. For a discussion of *in personam, in rem* and *quasi in rem* see *Cooper* v. *Reynolds,* 77 U.S. 308 (1870), *Weinstein Korn and Miller Manual,* pp. 3-9 (C. 1967), *Minichiello* v. *Rosenberg,* 410 F. 2d 106 (2d Cir. 1968). *Seider* v. *Roth,* 17 N.Y. 2d 111 (1966).

Historically the admiralty jurisdiction of the Federal Court has recognized that *in rem* obligations and immunities of a vessel or craft stand apart from those of its owner.

The liability rules distinguished between *in rem* action and *in personam* action should not be distorted to immunize the barge in this case considering the efforts of this Court to preserve the distinction. See *Benedict on Admiralty* (6 ed. 1940) § 16 pps. 26-28; *Ex Parte Easton,* 95 U.S. 68 (1877); *The China,* 74 U.S. 53 (1868); *The John G. Stevens,* 170 U.S. 113 (1897); *British West Indies Produce Inc.* v. *S.S. Atlantic Clipper,* 353 F. Supp. 548 (S.D.N.Y. 1973); *Homer Ramsdell Co.* v. *La Compagnie Generale Transatlantique,* 182 U.S. 406, 21 S.Ct. 831; *Ralli* v. *Troop,* 157 U.S. 386 (1895); *The Barnstable,* 181 U.S. 464 (1901); *Turner* v. *United States,* 27 F. 2d 134, (2nd Cir. 1928); *United Nations Children's Fund* v. *S.S. Nordstern,* 251 F. Supp. 833 (S.D.N.Y. 1965).

As Gilmore and Black said in *The Law of Admiralty,* (1957) § 1-12, pps. 30-33 at 32, of the maritime lien,

> "It may arise even though the owner of the vessel in which it subsists is not personally liable; on the other hand, a personal maritime liability may exist without the lien; many transactions and occurrences give rise to both a personal liability and a maritime lien."

The Carriage of Goods by Sea Act, Title 46 U.S.C.A. Sections 1300 et seq., in setting forth the package limitation in Section 1304 (5) states "neither the carrier nor the ship" [shall be liable for any loss in an amount exceeding $500 per package]. There seems to be no basis in justifying the use of less exact language in the exculpatory provisions of an adhesion contract. None has been suggested by the appellee nor has any case been cited in the opinion below.

In *Grillea* v. *United States,* 229 F. 2d 687 (2d Cir. 1956) the Court held a shipowner could not be held liable for a vessel under demise charter although the ship would be liable in an *in rem* proceeding.

The lower Court in this case did not have a proper appreciation of the *in rem* proceeding in saying "it cannot be allowed to provide an ingenious loophole in the limitation of liability" (A 48).

The validity of the jurisdiction clause in bills of lading and whether or not it applied to *in rem* as well as *in personam* suits was considered in *Carbon Black Export, Inc. v. SS Monrosa, supra.*

The bill of lading in that case included a clause that made Genoa the forum for any action against the shipowner. The clause however did not include the ship *in rem.*

The Fifth Circuit Court of Appeals held this clause didn't include *in rem* proceedings against the vessel.

The writ of certiorari to the United States Supreme Court was dismissed as improvidently granted. The Court dismissed the writ on this issue saying the clause did not encompass *in rem* actions and the Court made the point that if the shipowner intended to apply the clause to the ship *in rem* it could have easily done so in drafting the clause. 79 S. Ct. 710, 712; 359 U.S. 180, 183.

On the basis of the foregoing authorities the lower court erred in the application of those legal principles that would distinguish in this case the barge or floating derrick and its owner.

Realistically, the clause of the bill of lading, Clause 3, was intended to benefit stevedores with whom a carrier customarily has a cost plus relationship. All the cases cited to the lower court by appellee involved stevedores.

There is nothing in the bill of lading to suggest that any vessel or craft was intended to be benefited by the so called spreader clause.

Clause 1 of the bill of lading defining "ship" or vessel shows that the purpose of that craft must be *"in the per-*

formance of this contract. . . ." Since the contract is a contract of carriage it would be absurd to suggest that the floating derrick is what the carrier had intended when such floating derrick is clearly not a carrier any more than was the stevedore in the *Cabot* case, *op. cit.*

The cargo owner is only seeking compensatory damages. He is not trying to take advantage of the unsuspecting wrongdoer by finding ingenious loopholes in our standards of what is his due.

The cargo owner is prima facie entitled as a matter of right to compensatory damages, and since the defendant-appellees have pleaded a limitation of liability from the bill of lading it is their obligation to prove they fall fully within the orbit of the limitation as stated. *Commercial Molasses Corp.* v. *New York Barge Corp.*, 314 U.S. 104 (1941); *Freight Consolidators Cooperative Inc.* v. *U.S.*, 230 F. Supp. 692 (S.D.N.Y. 1964).

They take the limitation clause subject to the weaknesses and failures of its drafter to include their circumstances. *Alcoa S.S. Co. Inc.* v. *United States*, 70 S. Ct. 189, 338 U.S. 421.

The bill of lading relied on by appellees is to be construed as an adhesion contract. *Caterpillar Overseas, S.A.* v. *S.S. Expeditor*, 318 F. 2d 720, 722 (2d Cir. 1963).

The bill of lading is to be strictly construed to the extent that it purports to limit liability. *The Boston Metals Co.* v. *The Winding Gulf*, 349 U.S. 122.

On the basis of these principles the lower court should be reversed on its ruling that the barge *in rem* may limit its liability to $500 since the bill of lading does not give the barge that right.

POINT IV

The barge owner acting outside the scope of its charter with the steamship company is not an intended third party beneficiary.

The most important language to this point is the language of the lease by which the steamship company chartered the use of defendant-appellee's derrick barge: "It shall be the responsibility of Howlett to maintain in good order the Certificate which has been issued to this crane by the U.S. Department of Labor . . ." (A 23). This delineates what is outside the scope of employment. Had the dispute been between the parties to this lease there is no doubt the court would quite correctly exclude from the scope of the barge's employment by the steamship company what occurred when the derrick barge was having its crane tested to qualify for certification.

The plaintiff's cargo was delivered to States Marine-Isthmian Agency Inc. acting on behalf of the carrier pursuant to a dock receipt incorporating all terms of the carrier's regular long form bill of lading in use (A 21).

Such long form bill of lading provided as pertinent to this controversy as follows:

> "It is agreed that the following terms shall govern the relations, whatever they may be, *between the parties herein,* included in the words 'Merchant' and 'Carrier' in every contingency whenever, wherever and however occurring . . .
> "1. Definitions. The word 'Ship' or 'Vessel' shall include any substituted vessel and any craft, lighter or other means of conveyance owned, chartered or operated by Carrier *in the performance* of this contract, the word 'Carrier' shall include the vessel named herein, her owner, operator, charterer, Master, Agent and any substituted carrier, whether the owner, opera-

tor, charterer, Agent or Master shall be acting as Carrier or bailee . . .'' (emphasis supplied)

* * *

''3. Carrier's Servants, Agents, Stevedores, Contractors, etc. Because Carrier requires persons and companies to assist it in the performance of all work and services undertaken by it in connection with the cargo described herein as well as the cargo of others transported by Carrier, it is expressly agreed between the parties hereto that the Master, officers, crew members, contractors, stevedores, longshoremen, agents, representatives, employees, and others *used, engaged or employed by Carrier in the performance of the aforesaid work and services of the Carrier,* shall each be a beneficiary of this contract and shall be entitled to all exemptions and immunities from and limitations of liability which Carrier has under this bill of lading, whether written, printed or stamped hereon incorporated by reference herein, and under the United States Carriage of Goods by Sea Act, 1936, and in entering into the provisions of this Clause, Carrier, to the extent of such provisions, does so not only on its own behalf but also as agent and trustee of each of the persons and companies described above, all of whom shall be deemed parties to the contract in or evidenced by this bill of lading.'' (A 36)

* * *

Section 4 (5) of COGSA provides:

> ''Neither the Carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . .''

The plaintiff's cargo was lost overboard while defendant barge was in pursuit of its own interest, namely to obtain certification after inspection by International Cargo Gear Bureau (A 11, 26).

Therefore, Derrick Barge Howlett No. 18 was not being "used, engaged or employed by the Carrier in the performance of the [aforesaid] work and services of the carrier" when it lost plaintiff's cargo but it was acting in an area that the steamship company expressly excluded from the steamship company's responsibility. *Cabot Corporation* v. *SS Mormacscon and John W. McGrath Corporation,* 298 F. Supp. 117, aff'd 441 F. 2d 476 is controlling.

This bill of lading does not limit the liability of the barge or its owner for what occurred. Contracts purporting to limit liability should be strictly construed. *The Boston Metals Co.* v. *The Winding Gulf,* 349 U.S. 122.

Following this principle the New York Supreme Court, Appellate Division, unanimously affirmed *Cosa Export Co.* v. *Transamerican Freight Lines Inc.,* 1968 A.M.C. 1351, 303 NYS 2d 1003, dismissing a stevedore's limitation of liability claim.

In *Herd* v. *Krawill Machinery Corp.,* 359 U.S. 297, the court stated:

> "* * * Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited, to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties'. Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 123-124".

The clarity of the bill of lading language illustrates that a blanket limitation was not being extended but only one to those acting "in the performance" of a Carrier service. The language of Clause 3 of the Bill of Lading could have been left out by the steamship company if they wished but they didn't leave it out and the court must interpret the contract to give meaning to every part of it.

In *Chenango Textile Corporation* v. *Willock;* 288 N.Y.S. 270, 247 App. Div. 638, the Court said:

> "The rights and liabilities of the parties must be determined by the provisions of the agreement between them. Concededly the printed shipping receipt was prepared by defendant, and under well-settled principles of law any ambiguity in the terms of the contract must be resolved against it, particularly where it seeks to deprive the shipper of its common-law measure of damages. Hoye v. Pennsylvania R.R. Co., 191 N.Y. 101, 105, 83 N.E. 586, 17 L.R.A. (N.S.) 641, 14 Ann. Cas. 414; Galloway v. Erie R.R. Co., 116 App. Div. 777, 102 N.Y.S. 25, affirmed 192 N.Y. 545, 84 N.E. 1113; Inland Waterways Corp. v. Hallet & Carey Co. (C.C.A.) 52 F. (2d) 12."

On the motion in the District Court the parties to this appeal agreed that by virtue of the *Herd* decision a carrier may in a bill of lading extend the benefits of COGSA to third parties, but they were at issue as to whether this was such a case based on the bill of lading and barge lease before the Court. Clause 3 of the bill of lading quoted at the beginning of this point does not read all contractors so as to encompass the defendants but "contractors . . . used, engaged or employed by carrier in the performance of the aforesaid work and services of carrier . . ." This qualification was not included in bills of lading considered by the Courts in other cases. See *Carle & Montanari Inc.* v. *American Export Isbrandtsen Inc.,* 275 F. Supp. 76 (SDNY, 1967), affd. 386 F.2d 839 (2nd Cir. 1967), cert. den. 390 U.S. 1013 (1968) and *Bernard Screen Printing Corp.* v. *Meyer Line,* 328 F. Supp. 288 (SDNY, 1971), affd. 464 F. 2d 934 (2nd Cir. 1972), cert. den. 93 S. Ct. 966 (1973) where the limitation was upheld by the courts on behalf of a beneficiary and *Cabot Corporation* v. *SS Mormacsan, supra,* where it was not.

These questions of package limitation of liability are undoubtedly vexatious and difficult, but it is hardly a solu-

tion to adopt an attitude that the limitation will be at all times upheld and recovery limited. Not only would such an attitude violate traditional concepts, but bring about tortuous reasoning as evidence by the District Court's resort to the Scope of the Voyage Clause of the Bill of Lading (Clause 4) to avoid recognizing that Howlett was not an *intended* beneficiary of the package limitation clause.

This Court quite properly disposed of the suggestion that the shipper has the alternative of paying a premium for an *ad valorem* bill of lading in *Leather's Best, Inc.* v. *SS Mormaclynx,* 451 F. 2d 800 (2d Cir. 1971):

> "* * * The mere fact that it now turns out that a shipper able to foresee this Court's decision could have protected himself by insuring for the excess over $500 * * * does not save the limitation * * *"

There is some language in the District Court's opinion regarding the liability of stevedores suggesting that stevedores would be included in the carrier's limitation of liability by virtue of clause 3. There is no evidence in this case that defendant Howlett or the barge were engaged as stevedores, although perhaps for other people at other times under other circumstances Howlett may perform stevedoring services as indicated by their letterhead (A 23). The services by Howlett in this case are clearly set forth in the charter of the barge (A 23). It is further clear that the party indicated by the steamship company to perform stevedoring services was third party defendant Maher Stevedoring Company, Inc. This comment is made with regard to the poetic license of the opinion in the District Court which has nothing to do with appellant Howlett who is clearly a contractor.

Finally, the cargo owner relies on the historical concepts of our jurisprudence wherein wrongdoers, such as Howlett are held liable for compensatory damages and the Courts protect innocent plaintiffs from adhesion type

contracts in which the wrongdoer attempts to limit liability.

It is suggested the flaws in the contract relied upon by the wrongdoer have been illustrated so the Court could give the injured party its rights. Instead the District Court characterized these flaws "an ingenious loophole in the limitation of liability."

CONCLUSION

The judgment of the District Court limiting liability to $500 should be reversed and the matter remanded for reference to a Commissioner for proof of damages.

Respectfully submitted,

HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN
Attorneys for Appellant
Office and P.O. Address
96 Fulton Street
New York, New York 10038
Tel. (212) 233-6171

MARTIN B. MULROY,
Of Counsel

Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 10TH day of JUNE 1974

.....
Attorneys for DEFENDANTS AND
THIRD-PARTY PLAINTIFF - APPELLEES